BLANK

PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 6 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 725

EUGENE J. KEOGH,

Petitioner,

against

THE WASHINGTON POST CO.,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PHILIP HANDELMAN,
Attorney for Petitioner,
Bender Building,
1120 Connecticut Avenue, N.W.,
Washington, D. C.

Of Counsel:
ROBERT M. TRIEN,
ARTHUR H. SOBEL.

BLANK

PAGE

INDEX

Table of Cases Cited

	PAGE
Arscott v. Washington Post Co., Civil Action No. 1025-61 (D.D.C. May 20, 1964)	7
Garrison v. Louisiana, 379 U.S. 64 (1964)	5
Gilberg v. Goffi, 21 App. Div. 2d 517, 251 NYS 2d 823 (1964), aff'd mem. 15 NY 2d 1023, 260 NYS 2d 29 (1965)	6
Gilligan v. King, 48 Misc. 2d 212, 264 NYS 2d 309 (Sup. Ct. N.Y. Co. 1965)	7
Henry v. Collins, 380 U.S. 356 (1965)	5
Linn v. United Plant Guard Workers of America, Local 114, et al., 383 U.S. 53 (1966)	6
New York Times v. Connor, 365 F. 2d 567 (5th Cir. 1966)	6
New York Times v. Sullivan, 376 U.S. 254 (1964)	1, 2, 4, 6
Pape v. Time, Inc., 354 F. 2d 558, cert. den. 384 U.S. 909 (1966)	7
Pauling v. National Review, Inc., 269 NYS 2d 11. (Sup. Ct. N.Y. Co. 1966)	6
Schneph v. New York Post Corp., 23 App. Div. 2d 822, 259 NYS 2d 775 (1965)	7

Rule Cited

Federal Rules of Civil Procedure 56(f)	2

Miscellaneous Authority

Bertelsman, Libel & Public Men, 52 A.B.A.J. 657	7

BLANK

PAGE

IN THE

Supreme Court of the United States

October Term, 1966

No. 725

EUGENE J. KEOGH,

Petitioner,

against

THE WASHINGTON POST CO.,

Respondent.

PETITIONER'S REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Rather than serving to clarify the basic issues presented in the Petition, Respondent avoids those issues by mischaracterizing Petitioner's position, focusing on extraneous matter and refusing to acknowledge an obvious conflict in the decisions which has engendered wide-scale confusion as to the extent of a newspaper's responsibility when publishing articles written by columnists not in the newspaper's employ.

Contrary to Respondent's statement, Petitioner is not requesting the Court to "reconsider" or "renounce" the principles enunciated in *New York Times* v. *Sullivan*, 376 U.S. 356 (1964). Rather, the issue presented is the meaning of this Court's definition of "actual malice", the proof of which was held to be necessary to establish liability for defamation of a public official. Respondent, agreeing with the majority of the Court below, contends that a newspaper can print the most outrageous lie about a public official so long as the newspaper's employees who handle the article

maintain that they have no personal knowledge which should have led them to suspect that the statements in the article were false. That argument is, in effect, a claim that the *Times* case has so altered the law of libel that the extent of protection now given to a public official's reputation is dependent upon and directly proportionate to the knowledgeability of the newspapers' employees. Respondent characterizes as a "far-fetched hypothetical" the suggestion that invincibly ignorant editors could immunize a newspaper's publication of a columnist's slurs. Indeed, that is the situation here presented, the incomplete depositions * having revealed that the employees responsible for the publication of the instant articles were completely ignorant regarding the subject matter of the article. Respondent further argues that a showing that its employees were completely ignorant of the truth or falsity of such serious charges is not sufficient evidence to raise a genuine issue of fact as to whether the publisher was in reckless disregard of whether the charges were false or not. Respondent does not deny that the evidence adduced demonstrated that it disregarded any question of truth but contends that the seriousness of the charges in the articles is not in any way relevant to whether that disregard of truth or falsity was reckless.

Respondent repeatedly refers to its employees' affidavits wherein they state that they had no evidence to cause them to suspect that the articles contained any false statements. More importantly, Respondent fails to acknowledge that its employees had no reason to believe that the articles were true.

---

* Respondent claims that Petitioner could have sought relief pursuant to Rule 56(f) to complete the depositions and to depose Wiggins whose affidavit was submitted by Respondent. The record reveals that Petitioner did emphasize to both the District Court, which denied Respondent's motion, and to the Court of Appeals, which granted it, that discovery had not been completed.

Respondent's brief in opposition would have it appear that the articles complained of merely "report" that the petitioning congressman was not involved in a judicial scandal in which his brother, a judge, was convicted and imprisoned a "few months earlier" and that the articles reported the congressman's "voting record on natural gas legislation and aid to the Spanish Government and his relationship with a registered lobbyist". That is clearly a distortion of the true facts. The articles complained of are dated December 12, 1961 and February 19, 1962. The trial and conviction referred to was not a few months earlier, but in fact in May and June of 1962. The voting record referred to was in 1949 and 1950, some 11 years prior to the articles. It is obvious that respondent's effort at distortion is to create a picture which might properly fit into the frame for those situations where the courts have sought, in the interest of reporting daily news, to overlook inadvertent errors, the verification of which might delay the dissemination of current news of vital public interest. The articles rather than being as innocuous as respondent claims, clearly depict the picture of a congressman let off the hook because of his relationship with the President, the then Attorney General's brother. Unless anyone might think that he was in fact not involved with the alleged bribery, the articles claim that the congressman voted for certain legislation because of an illicit monetary relationship between himself and the registered lobbyist for Spain and the other interests involved in the legislation. In achieving this, the articles further distorts not only plaintiff's voting record but the very issues involved in the legislation. Petitioner is depicted not only as a traitor to his Country and to the best interests of his constituents, but the history of our national relationship with Spain is distorted. In any event, Respondent has conceded below and has conceded for the purposes of this application, that the articles are defamatory.

Respondent infers that because Pearson has written a lot of columns over a long period of time,* it was justified in disregarding whether the articles were false or not. Petitioner's affidavit, on the other hand, reveals that the newspaper's knowledge respecting Pearson's career in which his penchant for false reporting and speculation based on little or no facts was apparent, constituted further evidence that the newspaper's unquestioning publication of the articles in suit was reckless.

Pointing to the fact that the advertisement involved in the *Times* case charged wrongdoing which was as serious as that charged in the articles in suit, Respondent, as did the majority of the Court of Appeals, ignored this Court's specific finding in *Times* that the allegations of wrongdoing were substantially true and that the judgment of the Times' editor based on his prior knowledge of the facts, that the matter contained in the advertisement was true, was a reasonable one. The plaintiff in *Times* would certainly have been entitled to a trial on the issue of recklessness if the charges in the advertisement were completely false, were fabricated by the author of the advertisement and if the Times' editor was completely ignorant of the matter. That is precisely the posture of the case at bar.

Contrary to Respondent's claim, Petitioner does not urge a rule which would require "independent verification" by a newspaper. That phrase, used repeatedly by Respondent, assumes that the columnist has previously verified his accusations and suggests unnecessary duplication of effort. Rather, Petitioner contends that a publisher should bear responsibility where it wholly relies upon a columnist and publishes a column in which fabricated or recklessly concocted charges of crime and corruption appear. On its motion for summary judgment, Respondent presented no evidence whatsoever in support of its present theory regarding "independent verification". Respondent's theory

---

* The record contains absolutely no evidence for such statements which are made in both the Respondent's brief and the majority opinion below, Appendix D, p. 17a.

below was that, irrespective of whether Pearson fabricated the charges or was reckless in making them, it was not responsible since none of its employees handling the article knew that the charges were false. That is the substance of the decision of the court below.

Respondent's position is, in effect, that a newspaper's responsibility is dependent upon the financial arrangement between it and the writer of the article. Respondent admits to the exercise of the same control and editorial scrutiny of the work of both reporter and syndicated columnist. See Resp. brief, p. 5, J.A. 69. It is an irrational rule which would make newspapers responsible for the recklessness and fabrications of its reporters but not their columnists because one is on the publisher's payroll and the other's articles are purchased.

Respondent cites numerous cases which purportedly support its claim that a newspaper may with impunity disregard whether a serious charge of wrongdoing is false or not, so long as its employees have no reason to suspect falsity. In none of the cases cited was that proposition even remotely involved. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) this Court held that a criminal statute incorporated constitutionally invalid standards in the context of criticism of the official conduct of public officials. Nothing in that case supports the proposition accepted by the Court below, that the content of the libel is not relevant in determining whether actual malice motivated publication. Indeed, the defendant in *Garrison* may have been liable for damages or criminally responsible for publishing the serious defamatory statements there involved, upon proper jury instructions as to actual malice.

In *Henry* v. *Collins*, 380 U.S. 356 (1965), this Court reversed a jury award on the certiorari petition, for the reason that the jury charge given in that case permitted a finding of actual malice merely from an intent to inflict harm, rather than an intent to inflict harm through falsehood. Contrary to Respondent's claim, the Court expressed

no view as to whether on proper instructions the evidence would have sustained a jury verdict for plaintiff.

Respondent's reference to *Linn* v. *United Plant Guard Workers of America Local 114*, 383 U.S. 53 (1966) at p. 13 of its brief is misleading. This Court, at p. 383 U.S. at 65, n. 7, rejected the government's argument that the purposes of the National Labor Relations Act could only be fullfilled by limiting liability to those situations in which "grave" defamations were published during a union organizing campaign. The Court was not commenting on whether the seriousness of a libel could be properly considered in deciding whether a newspaper was in reckless disregard of the truth by publishing it in ignorance.

Neither does *Gilberg* v. *Goffi*, 21 A.D. 2d 517, 251 N.Y.S. 2d 823 (1964) aff'd per curiam, 15 N.Y. 2d 1024, 260 N.Y.S. 2d 229 (1965) support the decision below. The key to *Gilberg* is "that the alleged defamatory words . . . contain no direct reference to plaintiff . . ." 251 N.Y.S. 2d at p. 829. Upon this finding, summary judgment was properly awarded to defendant. That case has no application to the issues here involved, except to the extent that it reaffirms Petitioner's view as to the limited scope of the *Times* privilege and points up the importance of the fact that in the instant case the libel is clearly directed to the Petitioner.

In *New York Times* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966), judgment was awarded to defendant after a trial in which it was demonstrated that "every challenged statement has been traced to an identified source". 365 F. 2d at p. 576. Respondent made no such showing but merely offered proof that it was ignorant of the facts.

In *Pauling* v. *National Review, Inc.*, 269 N.Y.S. 2d 11 (Sup. Ct. N.Y. Co. 1966), the trial court, after reviewing a "voluminous record", held for the defendant, after finding that the only real accusation that could be found to be directed to the plaintiff, was followed by an admis-

sion in the article itself that there was "no legal evidence to support the charge" 269 N.Y.S. 2d at p. 19. That Court did not hold that an utter disregard for the truth of very serious charges of specific crimes allegedly committed by a named public official was or was not evidence of actual malice, nor did it hold, as Respondent argues, that a publisher is automatically entitled to summary judgment upon a claim of ignorance or unthinking belief.*

Respondent contends that *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965) cert. denied 384 U.S. 909 (1966) is not in conflict with the decision below because there purportedly was evidence in that case of "reckless rewriting" by the publisher. Rather, the Circuit Court held that the rewriting was "at least negligent" and that considering that a jury could read the article as containing a serious defamation, the publisher may have been reckless. That is exactly the reasoning which the Court below has rejected. See also, *Gilligan* v. *King*, 48 Misc. 2d 212, 264 N.Y.S. 2d 309 (Sup. Ct. N. Y. Co. 1965).

The fact is that no court has recognized or applied the rule announced in the majority opinion of the Court of Appeals below. The courts which have considered the question have agreed with the District Court below.**

---

* Other cases cited by Respondent which require only passing comment are *Arscott* v. *Washington Post Co.*, Civil Action No. 1025-61 (D.D.C. May 20, 1964) which is not reported officially or unofficially. The District Court, after examining the file in that case, stated that it does not stand for the proposition that serious defamatory accusations can never be evidence of malice (JA 114). *Schneph* v. *New York Post Corp.*, 23 App. Div. 2d 822, 259 N.Y.S. 2d 775 (1965) is a memorandum opinion in which neither the facts nor the holding is set forth.

** See Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 658 in which that commentator states that

"Some lower courts have held that very serious charges of specific crimes in themselves constitute some evidence of actual malice but whether this will be accepted by the Supreme Court remains to be seen".

The decision of the Court of Appeals subjects the reputation of responsible public officials to the whim and uncontrolled imagination of anyone who, for pleasure or profit, would seek to malign that reputation by fabrication or reckless accusation. Certainly the salutary goals of free expression and unfettered debate do not require such an obliteration of the time-honored protection to one's good name which has traditionally been afforded by the law of libel.

CONCLUSION

For all the reasons advanced, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PHILIP HANDELMAN,
Attorney for Petitioner,
Bender Building,
1120 Connecticut Avenue, N.W.,
Washington, D. C.

Of Counsel:
ROBERT M. TRIEN,
ARTHUR H. SOBEL.